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NO. 70-36

In the

Supreme Court of the United States

CHARLES R. PERRY, et al.,
Petitioners

vs.

ROBERT P. SINDERMANN,
for himself and for all others similarly situated,
Respondent

BRIEF OF PETITIONERS

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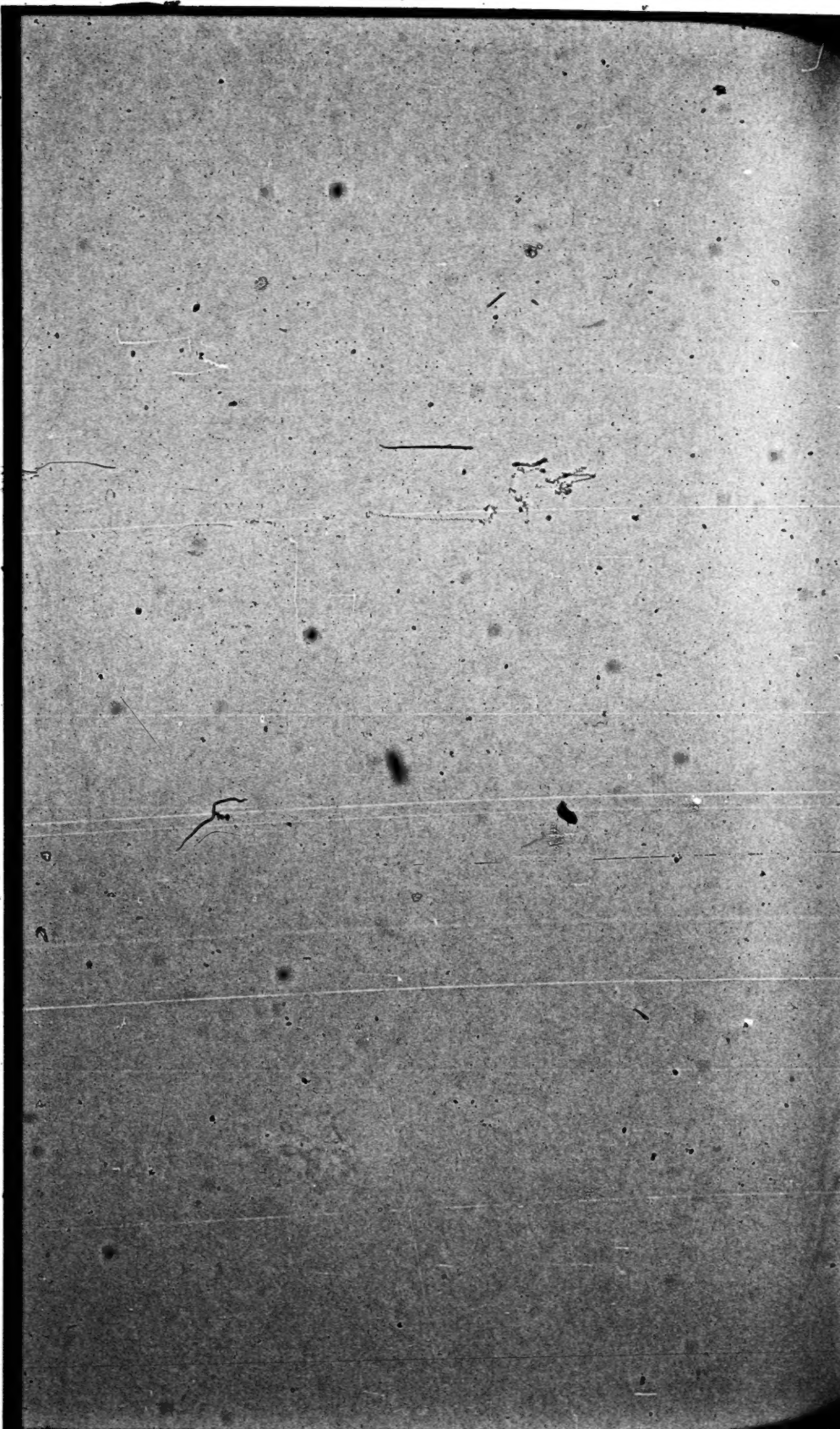

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I.

OPINIONS OF THE COURTS BELOW

The judgment of the United States District for the Western District of Texas, Midland-Odessa Division, is reported at Pages 106-108 of the Appendix. (A. 106)

The Opinion of the Fifth Circuit Court of Appeals is found at pages 185-196 of the Appendix, (A. 185) and the Judgment of that Court is found at Page 197 of the Appendix, (A.197) with the Order Overruling the Petition for Rehearing being found at Page 198 of the Appendix. (A.198).

The case is also reported in 430 F. 2d 939.

II.

JURISDICTIONAL STATEMENT

The Judgment of the Fifth Circuit Court of Appeals was entered on August 10, 1970, and is printed in the Appendix at Page 197. (A.197). Rehearing was denied on September 9, 1970, and that Order is printed in the Appendix at Page 198. (A.198). Jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Fourteenth Amendment:

"Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

3. 42 U.S.C., Sec. 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

4. Article VII, Sec. 1, Texas Constitution:

". . . it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

5. Article VII, Sec. 3, Texas Constitution:

". . . and the Legislature may also provide for the formation of school districts by general laws; . . .".

6. Article 2815h, Sec. 13, Texas Civil Statutes:

"The Board of Trustees of the Junior College shall have the power to select a president, dean or other administrative officer, and, upon his recommendation, to select the faculty and other employees of the college, and to fix the compensation and manner of payment of such administrative head, faculty and employees. . .".

7. Article 2815h, Sec. 20, Texas Civil Statutes:

". . . Said Board of Trustees shall adopt such rules, regulations and by-laws as they may deem proper, and they shall have exclusive power to manage and govern said Junior College. . .".

8. Article 2815o, Texas Civil Statutes:

Changed the Board of Trustees to a Board of Regents and increased members from 7 to 9.

IV.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in reversing the judgment of the trial court and in remanding the cause for trial, because the pleadings and summary judgment evidence established that petitioners did not deprive respondent of any right, privilege or immunity secured by the Federal Constitution and laws, and the trial court so held.

2. Whether the Court of Appeals erred in reversing the judgment of the trial court because respondent had no constitutionally protected right to have his teaching contract renewed, had no tenure and had no expectancy to continued employment under the constitution and Laws of the State of Texas and because the petitioners, in electing not to renew respondent's contract, validly exercised the discretion conferred and imposed upon them by the Constitution and Laws of the State of Texas.

3. Whether the Court of Appeals erred in refusing to follow **Jones v. Hopper,** 410 F.2d 1323, (10th Cir., 1969 (en banc), cert. denied 397 U.S. 991, 90 S.Ct. 1111, 25 L.Ed.2d 399 (1970).

V.

STATEMENT

This suit was brought in the United States District Court for the Western District of Texas, Midland-Odessa Division, by respondent Sindermann against the petitioners, who were the Board of Regents of Odessa Junior College, the individual members of the Board of Regents and the president of the col-

lege. Respondent based jurisdiction on 42 U.S.C., Sec. 1983 and 28 U.S.C., Sec. 1343, (A. 2).

Respondent alleged, in effect, that he was a teacher at Odessa Junior College for the school year 1968-1969 and that his contract was not renewed for the succeeding year in order to retaliate against him for his exercise of certain rights guaranteed under the First and Fourteenth Amendments to the Constitution. Respondent sought judgment that the decision of the petitioners not to renew his contract was in violation of his rights, that he be given a formal hearing on the reasons his contract was not renewed, that he be retained on the faculty for the succeeding school year, and that he recover $475,000 in actual and punitive damages. All of the petitioners filed motions for summary judgment (A. 78). These were granted by the trial court which found that respondent had no cause of action, had no contract, had no right which would require petitioners to execute a contract with respondent or to employ him and that petitioners did not violate any constitutional rights of respondent (A. 106).

Respondent Sindermann became a member of the faculty of Odessa Junior College in 1965 and by successive one-year contracts remained on the faculty through the 1968-1969 school year. His last one-year contract expired on May 31, 1969, which was the end of the school year. (Plaintiff's First Amended Original Complaint, Par. VI [A. 92]).

Odessa Junior College has no tenure system. No member of the faculty had any formal assurance that their employment would be continued beyond the school year during which they were teaching. This fact was not only known to Mr. Sindermann

at the time he entered into his original contract with the college, but also such fact was affirmatively stated in the **Faculty Guide** which was in use at the time of the commencement of and throughout his employment. (Plaintiff's First Amended Original Complaint, Par. VII [A. 92-93 and A. 15]). The renewal of a teacher's yearly contract is discretionary with the president and the Board of Regents under applicable state law as well. Article 2815h, Sec. 13 and 20, Tex. Civ. Stat., set out **supra.**

At one time Mr. Sindermann was made co-chairman of the Social Science Department with a $300 per year increase in pay. In the fall of 1968, however, he was dropped as co-chairman because of his addiction to writing lengthy letters to other members of his department and his unwillingness to follow certain administrative procedures. His salary was not reduced. (Pgs. 1-2, Appendix A to Plaintiff's First Amended Original Complaint [A. 12]).

In February of 1969 Mr. Sindermann was elected president of the Texas Junior College Teachers Association. Immediately after his election, contrary to the previous actions of other College faculty members who had held this same position, Mr. Sindermann requested a full time secretary, that he be relieved of a portion of his teaching load and that he be given time off from his classes to visit various other Texas junior colleges. These requests were refused. (Pgs. 2-3, Appendix A to Plaintiff's First Amended Original Complaint. [A. 12-13]).

On April 9, 1969, Mr. Sindermann sent a letter to Professor Sedate, Dean of the Evening College and Chairman of the Social Science Department, requesting permission to be absent from his classes

for the purpose of appearing and testifying in Austin, Texas, in connection with certain legislation pending in the Texas legislature. Pursuant to the provisions of the **Faculty Guide,** the letter was referred to the Dean of the College and then to the President. The request was denied by the President and a letter to this effect was sent to Mr. Sindermann on April 10, 1969. (Plaintiff's Appendix "AA", pgs. 4-6 [A. 16-17]).

On the afternoon of April 22, 1969, Mr. Sindermann again requested permission from the President of the college to be absent from his classroom and his teaching duties for the purpose of appearing and testifying at Austin, Texas, in support of certain legislation. This permission was denied by the president of the college, whose decision in such matters is final under the provisions of the **Faculty Guide.** In spite of the refusal, Mr. Sindermann was absent from his classes on April 23, 1969, and went to Austin to testify in connection with the legislation involved. However, no hearing was held in Austin and he did not testify.

Again, under date of April 25, 1969, Mr. Sindermann, by letter, requested permission from the chairman of his department to be absent from his classes on April 28, 1969, for the purpose of once more going to Austin to testify in support of certain legislation. He was again denied permission to be absent from his classroom duties and this refusal was delivered in writing to his home on April 26, 1969. In spite of this refusal by his superiors, Mr. Sindermann, by letter dated April 27, 1969, advised the chairman of his department that he would be absent anyway on April 28, 1969, and he was so absent

from his classes, contrary to the instructions of the administration. (Plaintiff's Appendix "A", pgs. 7 and 8; [A. 19-20]). Respondent affirmatively pleaded in his complaint and it is his position that these absences were "unauthorized" and without "the College Administration's approval". (Plaintiff's First Amended Original Complaint, Par. XII [A. 94]). This was one of the reasons for failing to renew his contract (Plaintiff's Affidavit in support of a Motion Opposing Summary Judgment; [A. 96, § 5.[3]).

Under date of May 19, 1969, the president of Odessa Junior College notified Mr. Sindermann that the Board of Regents had voted not to renew Mr. Sindermann's contract for 1969-1970. (Appendix "F", Plaintiff's Original Complaint [A. 53]). This suit was filed some three days later on May 22, 1969. Until the suit was filed, no request had been made for an administrative hearing. No hearing was held.

Each of the foregoing facts are established without contradiction or dispute by respondent's own pleadings.

VI.
ARGUMENT

Jones v. Hopper, supra, is directly contrary to the opinion of the court below, and was so recognized by the court below. In **Jones,** the complainant was an associate professor of philosophy at Southern Colorado State University. He did not have a tenure privilege. Jones was employed under one-year contracts, and at the end of his second year, the appellees, who were the president and the board of trustees of the college, determined he would not be re-

hired for a third year. Jones then filed suit under the Civil Rights Act claiming that he was not rehired because he had exercised his constitutionally protected rights under the first and fourteenth amendments in (a) objecting to the disqualification of an applicant for his department; (b) attacking an English text book in a student newspaper; (c) founding an independent publication containing articles criticizing the war in Viet Nam, commenting on labor problems and pacifism and objecting to monitored classrooms; and (d) supporting a student in his dispute with the draft board. Jones contended that he had an expectancy of continued employment which was terminated because of the conduct described and that this was an injury to an interest protected by the Civil Rights Act. Jones further contended that the appellees conspired to punish him for exercising his constitutional rights.

The trial court dismissed the complaint for failure to state a claim upon which relief could be granted. This was affirmed on appeal, the Tenth Circuit holding that Jones was not deprived of any rights, privileges or immunities secured by the Federal Constitution and Laws. The appellate court reasoned first, that Jones had no contract interest which was breached since the contract expired and did not exist, and second, that because of broad powers of management and control conferred on the Board of Trustees by Colorado Law, Jones had no expectancy to continued employment.

This decision should be controlling. First, the complaint in the instant case makes no allegation that a contract existed and seeks no recovery for a breach of contract. Second, the powers conferred by Texas Law upon the Board of Regents and President of

Odessa Junior College are no less broad than those of Colorado Law. See Texas statutes cited above. Petitioners are given the power to select the faculty and exclusive power to manage and govern the junior college. The statutory powers given to the Board, the one-year contract and the lack of tenure all, as clearly as in **Jones,** militate against and deny an expectancy to continued employment. Mr. Sindermann was not deprived of any constitutionally protected right or privilege and the trial court was correct in so holding.

The conflict presented by **Jones** and the opinion of the court below is obvious. It must be reconciled for the guidance of our educational institutions.

The summary judgment evidence establishes that the petitioners, in not rehiring Mr. Sindermann, did not exceed their authority nor abuse the discretion imposed by State Law. Surely, petitioners must retain some control over the makeup of the faculty. The issue in not rehiring and the concern of the administration, as shown by the press release attached as "Exhibit A" to Plaintiff's Amended Complaint, (A.12) were not that Mr. Sindermann had spoken out or exercised his right of free speech, but that he had in the past caused some inconvenience in his department with lengthy letters, evaded administrative procedures, made unusual demands of the college with respect to his Texas Junior College Teachers Association position and strongly indicated that position was paramount over the teaching function he was employed to perform. This pattern finally culminated in Mr. Sindermann's disregarding his teaching duties and the instructions of the college administration in order to lobby, at a time of his own choosing, for legislation in which the Associa-

tion was interested despite the fact the Association employed an agent for this very purpose. The petitioners, in the exercise of the discretion expressly granted to them by Texas Law, and subject to election by the voters of the Junior College District, had the right to consider the past attitude and conduct of the respondent in determining the makeup of the college faculty and in determining whether or not the best interests of the college and its educational function would be promoted by refusing to rehire petitioner or any other professor. This discretionary power has been exercised in a reasonable, legitimate manner consistent with all constitutional and statutory rights of Mr. Sindermann.

The First Circuit has aligned itself with the Tenth Circuit. In **Drown v. Portsmouth School District,** 435 F.2d 1182 (1st Cir. 1970), the Court held that a hearing was not required by a non-tenured schoolteacher whose contract had not been renewed. In the **Drown** case, the teacher complained that she was deprived of her rights guaranteed by the Constitution when her standard one-year contract was not renewed and she sought and was denied a list of reasons for the decision not to rehire her, and was also denied a hearing so that she might challenge whatever reasons might have been given. While the **Drown** case does give a rather thorough discussion of the division among the Circuit Courts of Appeal on whether or not teachers have a right to an administrative hearing, it also serves to point out that the Courts have been called on to "balance the competing interests of the individual teacher and of the school board."

In the case at bar, however, no request for a hearing was made by Sindermann until after he filed

suit in the United States District Court. A hearing actually would have served no purpose in this case, either, because Sindermann had already been advised of the reasons for the president not recommending to the Board of Regents that the contract be renewed.

The **Drown** case also is authority for the fact that non-tenured teachers who do not like being hired on an annual basis can either bargain with the school board employer to change the term of the contract, or the teacher can seek employment in institutions where the terms are different.

The **Drown** case, of course, is in direct conflict with the Fifth Circuit because the First Circuit refused to require the school authorities to hold an administrative hearing even if the reasons for the termination were constitutionally impermissible and even if the decision to terminate had been made in bad faith. Justice Coffin, for the First Circuit, also refused to accept the Fifth Circuit's distinction "between non-tenured teachers who have an expectancy of re-employment and those who do not." Rather, the Court, in the **Drown** case, maintained that:

> almost every teacher, arguably, at least, has such an expectancy and we think a teacher has an interest in employment protected by the due process clause independent of the existence of this quasi-contractual right."

Still another case which is authority for reversing the instant case is the case of **Freeman v. The Gould Special School District of Lincoln County, Arkansas,** 405 F.2d 1153 (8th Cir. 1969), Cert. den. 396 U.S. 843. This case involved an internal struggle between the teachers and their principal in the school in Ar-

kansas. In the course of the Opinion, Circuit Judge Gibson held:

> "Absent statutory or contractual requirements, persons discharged for inefficiency, incompetency or insubordination have no constitutional right to a hearing with rights of cross-examination and confrontation of witnesses."

By his own pleadings the Respondent in this case has admitted that one of the reasons the employment contract under which he was working was not renewed was because of insubordination. There are no statutory or contractual requirements in the State of Texas requiring that a hearing be held.

The **Freeman** case goes on to hold: "There must be some degree of harmonious cooperation in school administration to insure an efficient use of public funds and a reasonably satisfactory school program. School boards are representatives of the people and should have wide latitude and discretion in the operation of the school district including employment and re-hiring practices. Local autonomy must be maintained to allow continued democratic control of education as a primary state function subject only to clearly enunciated legal and constitutional restrictions."

The Board of Regents of Odessa College are representatives of the people and they should be given the same wide latitude and discretion in the operation of the school district that the Gould Special School District of Lincoln County, Arkansas, was given.

When the respondent, over a period of months, showed a lack of cooperation with the college administration, an unwillingness to follow administrative procedures, made unreasonable demands and

finally when the respondent wilfully and intentionally disobeyed the administration's directive to teach his classes and not absent himself from the classroom, and by his own pleadings admitted such action, the Board of Regents did not deprive him of any right, privilege or immunity secured by the Federal Constitution and laws. The Board of Regents and the President of the College, because of this conduct, elected not to renew the respondent's contract and such was a valid exercise of the discretion conferred and imposed upon them by the Constitution and Laws of the State of Texas.

An analagous case is **Beilan v. Board of Education of Philadelphia,** 357 U.S. 399, 2 L.Ed. 1414, 78 S.Ct. 1317 (1958). There a teacher refused to tell his immediate supervisor whether or not he had ever been a member of the communist party, and was dismissed on the grounds of incompetency.

Justice Burton, in his opinion for a majority of the Supreme Court, said:

> "The only question before us is whether the Federal Constitution prohibits petitioner's discharge for statutory incompetency 'based on his refusal to answer the superintendent's questions.' "
>
> * * * * *
>
> "By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher."
>
> * * * * *

"It (the Board) took care to charge petitioner with incompetency, and not with disloyalty. It found him **insubordinate** and lacking in frankness and candor—it made no finding as to his loyalty."

* * * * *

"In the instant case, the Pennsylvania Supreme Court has held that 'incompetency' includes petitioner's '**deliberate** and **insubordinate** refusal to answer the questions of his administrative superior in a vitally important matter pertaning to his fitness.' 386 Pa. at 91, 125 A.2d, at 331. This interpretation is not inconsistent with the Federal Constitution." (Emphasis added.)

Paraphrasing Justice Burton, we might say that Professor Sindermann, by engaging in teaching at Odessa Junior College, did not give up his right to speak out. He did, however, undertake obligations of candor, discipline and cooperation and his failure to live up to those obligations resulted in the refusal of the Board of Regents to reinstate him.

Respondent's pleadings admit that Odessa Junior College has no tenure system, and that an employee of the college can expect to be employed only so long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors. The **Beilan** case found, as a matter of law, that simply refusing to answer questions of an administrative superior was deliberate insubordination amounting to incompetency and that discharge on this basis was not violative of any of petitioner's rights under the Constitution of the United States (and this, in a tenure state). Certainly, in the instant case, Sindermann's deliberate course

of conduct brings him within the framework of **Beilan.**

In **Bradford v. School District No. 20, Charleston, South Carolina,** 364 F.2d 185 (4th Cir. 1966), the appellant, a teacher in a high school in Charleston, brought a suit in the federal district court, claiming that the School Board violated his due process rights because he was dismissed from his position without notice or opportunity to be heard. Although Bradford based his action on Sections 1981 and 1983 of Title 42, U.S.C., the suit was dismissed with prejudice.

Bradford alleged that he went to a barbershop, was refused service, and was thereafter arrested for being drunk, disorderly and assaulting an officer. He was tried in Corporation Court, found guilty and appealed his conviction to the county court, where it was still pending. He pleaded he was dismissed from his teaching job because of his alleged misconduct. The trial judge held that the petition failed to state a cause of action. The appellate court stated that the district court had properly treated the motion to dismiss as a motion for summary judgment under Rules 12 (b) and (c), and that the motion was supported by allegations in the complaint which showed a valid ground for the school board's action of dismissal.

Circuit Judge Bell stated:

"We think too the court was justified in rejecting the plaintiff's contention that his right to equal protection of the laws was violated by the action of the school Trustees. That the Trustees had the statutory duty and responsibility of supervising the conduct of teachers and of dismissing them in proper cases is conceded. **Adler v. Board of Ed-**

ucation, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517 (1952); **Garner v. Board of Public Works of City of Los Angeles,** 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317 (1951). In **Adler** the Court said:

> "That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.'

"The Supreme Court has also declared that fitness for teaching depends on a broad range of factors, and that there is no requirement in the Federal Constitution that classroom conduct must be the sole basis for fitness. **Beilan v. Board of Education,** 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed. 2d 1414 (1968). It is, of course, true that the Board's discretion may not be exercised in an arbitrary and capricious manner, nor may the Board exercise its discretion in a discrimnatory manner. **Johnson v. Branch,** 364 F. 2d 177 (4th Cr. 1966); **Franklin v. County School Board of Giles County,** 360 F.2d 325 (4th Cir. 1966), and cases cited therein. Given the plaintiff's admission that he had been convicted by the Municipal Court of public drunkenness and assaulting an officer and that his suspension was 'by reason of his alleged misconduct', his failure to allege or contend that the defendants had in any way colluded or conspired in that conviction or had any knowledge of any impropriety therein, we think the court had before it objective facts shown on the face of the complaint which support the discretionary action of the Board and which combined with his failure to notify the Board of any defense, constituted an insuperable

bar to relief. Cf. **Leggett v. Montgomery Ward & & Co.,** 178 F.2d 436 (10 cir. 1949); **Bach v. Quiran,** 5 F.R.D. 34 (D.C.N.Y. 1945).

"We think these facts left no genuine issue of fact to be decided and even giving the plaintiff the benefit of all reasonable doubt, see Wright, **Federal Courts,** Pg. 387 (1963), the defendants were entitled to the summary judgment which the court granted."

Sindermann, as in **Bradford,** has "given this court his "admission" that he was uncooperative with the administration and wilfully disobedient. The admission leaves "no genuine issue of fact to be decided, and even giving Mr. Sindermann the benefit of all reasonable doubt", petitioners were entitled to their summary judgment. A contrary conclusion would require them to violate their duty under law, and invite the other 100 faculty members to disregard all administrative policy and authority.

The Fourth Circuit, in 1965, dealt with a non-tenured teacher and in the case of **Parker v. Board of Education of Prince George's County, Maryland,** 348 F.2d 464, (4th Cir. 1965), affirming 237 F. Supp. 222 (D. Md. 1965), cert: den. 382 U.S. 1030 (1966), upheld a summary judgment though Parker was complaining that his 5th, 14th and 1st Amendment rights had been abridged. Nevertheless, in the per curiam opinion the decision was that on the basis of the contract alone the teacher failed to state a cause of action for re-instatement or damages. The situation in the instant case is identical except here we have a teacher who, by his own admission, violated the directives of the administration.

The Civil Rights Statutes and the proper administration of public schools must be viewed in proper context. In **Ferrell v. Dallas Independent School District, et al,** 392 F.2d 697 (5th Cir. 1968), the school principal refused to enroll male students because they failed to comply with a school regulation banning long hair. The Fifth Circuit affirmed the district court, which had concluded that the school authorities had not acted arbitrarily, capriciously or unreasonably in refusing to admit the students.

Judge Gewin wrote:

"This case brings into focus a sensitive area of the law. Constitutional issues which arise under the Bill of Rights have been before the courts many times. The decided cases clearly demonstrate that each case must be decided in its own particular setting and factual background and within the context of the entire record before the court in determining whether the rule or the action about which complaint is made is arbitrary, capricious, unreasonable or discriminatory. This approach to the problem is clearly demonstrated by the authorities hereinafter cited as well as the following: **Thornhill v. State of Alabama,** 310 U.S. 88, 101, 60 S.Ct. 736, 84 L.Ed. 1093, 1102; **West Virginia State Board of Education v. Barnette,** 319 U.S. 624, 627, 63 S.Ct. 1178, 87 L.Ed. 1628, 1637; **Dennis v. United States,** 341 U.S. 494, 510, 71 S.Ct. 857, 868, 95 L.Ed. 1137, 1153; **Whitney v. People of the State of California,** 274 U.S. 357, 376, 47 S.Ct. 641, 71 L.Ed. 1095, 1106. In **Dennis v. United States,** supra, the Supreme Court approved, as a general rule, the following statement by Chief Judge Learned Hand.

> 'In each case (courts) must ask whether the gravity of the "evil", discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'

"The Constitution does not establish an absolute right to free expression of ideas, though some might disagree. The constitutional right to free exercise of speech, press, assembly, and religion may be infringed by the state if there are compelling reasons to do so.

"The compelling reason for the State infringement with which we deal is obvious. The interest of the state in maintaining an effective and efficient school system is of paramount importance. That which so interferes or hinders the state in providing the best education possible for its people must be eliminated or circumscribed as needed. This is true even when that which is condemned is the exercise of a constitutionally protected right."

Just as in the **Ferrell** case, the Board of Regents was and is compelled by the Constitution of the State of Texas, Article 7, §1, and the statutes of Texas, to adopt regulations for an efficient and effective system and to manage and govern the school consistent with such laws and Constitution. It has done nothing inconsistent with these state requirements nor to unconstitutionally infringe on Sindermann's rights in refusing to renew his contract. The Board has properly exercised its discretionary powers.

Contrary to what the opinion of the lower court seems to recognize, respondent has no absolute right to absent himself from and neglect his school classes

for the purpose of attending a committee hearing at a location over 300 miles away, particularly when the proposed legislation which allegedly prompted the absence was not brought before the legislative committee. The import of the opinion is contrary to **Bomar v. Keyes,** 162 F.2d 136 (2d Cir. 1947), where the court stated at Pg. 139:

> "We do not mean to suggest that a teacher may absent herself from work indefinitely and serve on a jury without regard to her duty; i.e., that she may choose her own time or stay away as long as she pleases."

If there exists valid reasons for refusing to rehire Mr. Sindermann, i.e., his past attitude and conduct, then the parallel existence of invalid reasons, such as newspaper criticism of the administration, would not render nugatory the valid reasons—notwithstanding Sindermann's claim that the invalid reason was the **sole** cause of not being rehired. The valid reasons for not rehiring Mr. Sindermann cannot be erased by his own acts in other activities. If so, the most guilty could profit by simply engaging in offensive (but constitutionally guaranteed rights) and claiming the latter provoked the difficulty, and the former is thereby rendered immaterial.

It must be remembered that we are dealing here with a disciplinary problem. No doubt, the respondent will rely on the case of **Pickering v. Board of Education,** 391 U.S. 563 (1968), and **Pred v. Board of Public Instruction,** 415 F.2d 851 (5th Cir. 1969), but the opinions in both of those cases recognized that discipline is of high priority in the operation

of any school or question. As a matter of fact, the Supreme Court, in the **Pickering** case, said this:

> "Thus no questions of maintaining either discipline by **immediate superiors** (emphasis ours) or harmony among co-workers is presented here."

The President and Board of Regents were acting within the law, and did not violate respondent's constitutional rights when they refused to renew the employment contract. The question in the case at bar is one of maintaining discipline. Where the respondent admittedly, on not one but two separate occasions, flaunted the express instructions of the administration, he is not entitled to relief.

As Circuit Judge Gibson wrote in the **Freeman** case, supra:

> "We do not think it within the province of the federal court to pass upon and decide the merits of all the internal operative decisions of a school district."

This Honorable Court held in **Shelton v. Tucker,** 364 U.S. 479, 487, 81 S.Ct. 247, 251 (1960):

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. **** Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

Respondent, through his past actions, has made himself patently unacceptable to the administration

of an orderly, effective college system. The petitioners concluded, in the exercise of a reasonable and sensible judgment, that it would not be in the best interest of the college to make a new contract with Mr. Sindermann. This action was based on adequate and sufficient, even compelling reasons, and should be affirmed by this court.

CONCLUSION

This Honorable Court should render judgment reversing the judgment of the Fifth Circuit Court of Appeals and affirming the judgment of the Trial Court.

Respectfully submitted,

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